COURT OF APPEALS
DECISION
DATED AND RELEASED

January 4, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

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No. 94-3271

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

ROBERT W. GULDBEK,

Plaintiff-Respondent,

v.

CURTIS L. MARZAHL,

Defendant-Third Party Plaintiff-Appellant-Cross Respondent,

GARY STELPFLUG,

Third Party Defendant-Respondent-Cross Appellant,

FARMERS HYBRID COMPANIES, INC., FH FINANCIAL SERVICES, INC.,

Third Party Defendants.

APPEAL from a judgment of the circuit court for Grant County: GEORGE S. CURRY, Judge. *Modified and, as modified, affirmed.*

Before Gartzke, P.J., Dykman and Vergeront, JJ.

DYKMAN, J. Curt L. Marzahl, a tenant-farmer, appeals from a judgment for rent due for a pig farm and for the proceeds of the sale of pigs. The issues raised are: (1) whether there is credible evidence to support the award of rent; and (2) whether the trial court erred in determining the proper division between Marzahl and Gary Stelpflug of proceeds from the sale of the pigs. We conclude that credible evidence supports the rent award but that the court made a miscalculation when it divided the proceeds of the pig sales. Accordingly, we modify the judgment and, as modified, affirm.

BACKGROUND

In 1988, Robert W. Guldbek leased his pig farm to a farmer, Curtis L. Marzahl. The lease was for three years and rent was set at five percent of the net sales of all pigs born and raised on the farm. Marzahl also signed an agreement to raise pigs for Farmers Hybrid Companies, Inc. (FHC). Under that agreement, Marzahl received breeding stock from FHC, and was entitled to twenty-three percent of the sales of the offspring which reached 220 to 260 pounds. FHC received eleven percent of the sales proceeds as rent for its breeding stock and other services, and a feed supplier received the remaining sixty-six percent.

Marzahl's relationship with Guldbek deteriorated during the lease term, and although both discussed renewing the lease or a sale of the farm to Marzahl, no agreement materialized. Guldbek began an eviction action against Marzahl, and Marzahl was forced to leave the farm on November 20, 1992. Gary Stelpflug, a neighboring farmer who also rented another portion of Guldbek's farm, agreed to take over the pig raising operation for FHC.

On November 19, 1992, FHC and Stelpflug signed an agreement which reads in pertinent part:

> This letter of agreement is to confirm that as of November 21, 1992, that Gary Stelpflug will take

> over the FH Financial Services Six Twenty-One Swine Production Agreement between FH Financial Services and Curt Marzahl dated September 1, 1990. A copy of the agreement is attached. Until the term of the agreement has been fulfilled, Gary Stelpflug will accept and perform all the producer obligations specified in this agreement. Gary Stelpflug will receive the producer compensation specified in Section 5....

At about the same time, FHC and Marzahl signed an agreement which reads:

> This letter of agreement is to confirm that as of November 21, 1992, that Gary Stelpflug will take over the FH Financial Services Six Twenty-One Swine Production Agreement between FH Financial Services and Curt Marzahl dated September 1, 1990. Any compensation paid to Curt Marzahl after November 20, 1992 offspring sales will be agreed upon by all parties (i.e. FH Financial Services, Curt Marzahl and Gary Stelpflug).

The various parties disagreed about who owed whom what amounts of money, and Guldbek began this action. His first cause of action was against Marzahl in which he demanded $14,318 for damages to the farm allegedly caused by Marzahl. Guldbek's second cause of action was for rent. He asserted that he had not received five percent of the value of the pigs on the farm as of November 20, 1992, and he demanded a declaratory judgment requiring FHC to pay the five percent as the pigs were marketed. No demand was made of Stelpflug.

Marzahl answered, denied Guldbek's assertions, and counterclaimed against Guldbek for alleged breaches of the lease for reasons having to do with improvements and work allegedly promised by Guldbek. Marzahl also cross-claimed against FHC, alleging that up until November 20, 1992, he was entitled to twenty-seven percent of the value of the pigs he turned over to Stelpflug, or $19,141.65. Finally, Marzahl cross-claimed against

Stelpflug for the same $19,141.65, asserting that Stelpflug had received part of that sum from FHC, and would receive the balance over time.

Stelpflug answered, denying Guldbek's assertions. He also denied the assertions in Marzahl's cross-claim. He filed a cross-claim against Marzahl, asserting a contractual agreement with Marzahl to pay him four percent of the net sales of the pigs for work on Marzahl's feed bins. Stelpflug also asserted that Marzahl had failed to pay an electric bill and that Marzahl had mismanaged the herd of pigs, causing Stelpflug to incur additional costs. He demanded about $17,600 plus an additional amount for economic loss.

FHC answered, denying any liability to Guldbek or Marzahl. It also cross-claimed against Marzahl for indemnification should it be found liable to Guldbek.

Eventually all parties agreed to the dismissal of Guldbek's claim for a declaratory judgment against FHC. FHC then cross-claimed against Marzahl and Stelpflug. The cross-claim was, in effect, an interpleader. FHC asserted that it owed $17,861.41 to someone—either Marzahl or Stelpflug, or Marzahl and Stelpflug. It was willing to pay into court $19,141.65 to be relieved of further participation in the lawsuit. FHC moved for judgment on its interpleader. None of the parties opposed FHC's motion, and the trial court ordered FHC to pay $19,141.65 to the clerk of court. It then dismissed FHC from the action with prejudice.

The net effect of FHC's dismissal is important. Afterward, the lawsuit involved Guldbek's claim for rent, and Marzahl's and Stelpflug's claims against each other for the $19,141.65 plus other damages. Most significantly, both Marzahl and Stelpflug had given up their claims against FHC. Thus, had FHC's agreements with Marzahl and Stelpflug required that it pay more than $19,141.65 to the two pig farmers, the farmers would have no recourse against FHC. Furthermore, Marzahl and Stelpflug had no agreement with each other as to how they would be compensated for the part each played in raising the pigs, or how they would divide any sum FHC might eventually pay.[1] Each had an

[1] Marzahl and Stelpflug signed an agreement on October 18, 1990, which concerned the four percent claim which Marzahl had against Stelpflug for work on feed bins. But this agreement did not attempt to divide the money owed by FHC between Marzahl and Stelpflug. Marzahl's appeal asserts that the trial court erred by giving him only thirty-six

agreement with FHC which each believed governed what he would be paid. But, as we have noted, FHC's dismissal from this case prevented them from determining what each was due from FHC under the terms of each agreement. The trial court was, therefore, required to determine the various claims of Marzahl and Stelpflug in the absence of any agreement between them as to how FHC's payment would be divided. While each farmer might have received more than he eventually did had he pursued his claims against FHC, both chose to settle with FHC and litigate against each other.

GULDBEK'S CLAIM

The controversy surrounding Guldbek's claim relates to the fact that Marzahl not only raised pigs on the Guldbek farm, but also raised pigs on what the parties call the "Cox farm." Guldbek and Marzahl agree that rent was to be five percent of the proceeds from the sale of pigs raised on the Guldbek farm only. Guldbek asserts that a deposition of the president of FHC shows that only the pigs raised on the Guldbek farm were included in FHC's accounting of what it believed it owed the two farmers.

Marzahl quotes at length from the FHC president's testimony to support his contention that FHC included in its report proceeds from the sales of pigs raised on both farms. He asserts that there was no evidence or testimony contradicting his testimony that the proceeds from the pigs he raised on the Cox farm were included in the total proceeds which he was paid by FHC.

We agree that the FHC president made no reference to the Cox farm, and that there was no explicit testimony that FHC's records did not show proceeds from the pigs raised on the Cox farm. But the FHC president did testify that a summary sheet showed all of the sales "From Mr. Marzahl's farm, right." Further testimony referred to "the Marzahl farm" and "that farm." This testimony referred to "farm" in the singular. It is undisputed that the Cox farm and the Guldbek farm were separate farms. This is evidence from which the trial court could have found that FHC's records were records of pigs produced on the Guldbek farm and not the Cox farm.

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percent of the $19,141.65. We, therefore, need not consider this October 18 agreement further.

Equally important is the trial court's treatment of Marzahl's testimony. The court's decision noted: "The credible evidence does not support a finding that these net sales included sales from the Cox farm." The key word in this sentence is "credible." It is undisputed that Marzahl testified that Cox farm sales proceeds were included in the FHC total. But the court did not believe that testimony. Had it believed Marzahl, it would have made a finding in Marzahl's favor resolving the conflict between the FHC president's testimony and Marzahl's testimony.

The trial court is the ultimate arbiter of witness credibility. ***State v. Marty***, 137 Wis.2d 352, 359, 404 N.W.2d 120, 123 (Ct. App. 1987). The court drew an inference from the FHC president's testimony that if the president had been testifying about the proceeds from pigs raised on two farms, she would not have specifically referred to "the Marzahl farm" or "that farm" in the singular. Having drawn that inference, the court resolved the conflict between that testimony and Marzahl's testimony by rejecting Marzahl's. As we have noted, that decision, depending entirely on witness credibility, is not reviewable by an appellate court. We, therefore, conclude that there was sufficient evidence to support the court's finding as to the correct amount of proceeds from the sale of the Guldbek farm pigs and, therefore, the correct amount of rent which Marzahl owed Guldbek.

INADEQUATE AWARD

Marzahl asserts that the trial court erred by awarding him only $6,892.07 of the $19,141.65 paid by FHC to the court. He asserts that he was entitled to $20,103.48. Nonetheless, he concedes that he cannot receive more than the amount the court ordered FHC to pay, or $19,141.65.

We quote the paragraph of the trial court's decision in which it explained how it divided the amount FHC paid:

> [FHC] paid $19,144.65[2] from the market price sale of the 1,383 swine, which would have been Mr.

[2] By order dated November 4, 1993, the trial court ordered FHC to pay $19,141.65. When later dividing that amount between Marzahl and Stelpflug, however, the court erroneously used a figure of $19,144.65. For the purposes of this appeal, we will use the

> Marzahl's compensation if he had been the producer at the time they were sold. On November 20, 1992, 36 percent of production of the 1,383 swine was completed. (127,654 pounds is the total weight of 1,383 swine divided by 345,750 pounds—1,383 swine at "market" weight of 250 pounds. See testimony of G. Stelpflug regarding "market" weight). Mr. Marzahl did 36 percent of the work necessary to raise those 1,383 swine.

Much of the underlying data upon which the court relied was contained in a memo dated November 20, 1992, written by Jerry Boyington, an FHC employee. On that date, which was also the date when Marzahl left the Guldbek farm and Stelpflug took over, Boyington toured the farm, counted the pigs, and determined their fair market value. He counted 1,383 pigs on the Guldbek farm, ranging from 201 suckling pigs which he valued at $2,515 to three 225 pound finisher pigs, which he valued at $270. Boyington testified that the total weight of the 1,383 pigs was 127,654 pounds, and the total value of the pigs was $70,895. From that he subtracted $15.00 per pig for 702 slaughter weight pigs, those weighing between 162 pounds and 225 pounds. He considered the $15.00 to be the cost to sell each of these pigs. The net value of the pigs was, therefore, $60,365.[3]

Once one understands the data used by the trial court, the formula by which it determined Marzahl's share of the $19,141.65 is easily determined. The court concluded that when the pigs were eventually sold, they would be sold at market weight, or about 250 pounds. The court then determined that the 1,383 pigs, when sold, would weigh about 345,750 pounds. From their birth until Marzahl left the farm, the pigs increased in weight to 127,654 pounds. Dividing 127,654 by 345,750 equals .369. The trial court multiplied $19,144.65 by thirty-six percent, the pigs' weight gain under each farmer. It, therefore, gave

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correct amount, or $19,141.65.

[3] Boyington used the figure of $60,530 as a net value of the pigs. We deem the difference between $60,365 and $60,530 as insignificant.

Marzahl thirty-six percent of that sum, or $6,892.07. It gave Stelpflug sixty-four percent of that sum, or $12,252.58.[4]

Marzahl asserts a number of reasons why the trial court's calculations were erroneous. He asserts that § 9.2 of his agreement with FHC governs his compensation. That section provides in part:

> Upon termination, Producer shall be entitled to receive his percentage share of compensation as specified in Paragraph 5 above, arising from the offspring produced and existing on the effective date of termination.

There are several problems with this assertion. First, § 9 of the agreement, is entitled "TERMINATION PROVISIONS." Section 9.2 is entitled "[FHC] TERMINATION WITHOUT CAUSE." If the agreement was terminated, FHC did not terminate it without cause. If FHC terminated the agreement, the reason was because Marzahl could no longer perform his part of the agreement, having been evicted from the Guldbek farm. Under § 9.1 of the agreement, entitled "[FHC] TERMINATION WITH CAUSE," Marzahl would be entitled to nothing. He cannot complain that the trial court gave him an award.

Second, Marzahl and FHC did not terminate their agreement. They amended it in November 1992 when they both signed a letter of agreement in which they agreed that Stelpflug would "take over" Marzahl's agreement with FHC. The agreement governed the pig operation on the Guldbek farm, and it continued to govern that operation until the agreement terminated by its own terms. The only difference was the name of the producer. Thus, Marzahl's reliance on § 9.2 of his agreement with FHC is misplaced.

Third and more importantly, Marzahl does not explain how he could enforce a contract he had with FHC against Stelpflug. Even if we were to conclude that § 9.2 of Marzahl's agreement with FHC determined Marzahl's

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[4] The trial court should have used thirty-seven rather than thirty-six percent. Using that rate and the correct base sum of $19,141.65, we conclude that Marzahl is entitled to $7,082.41 and Stelpflug is entitled to $12,059.24.

damages, those damages would be owed by FHC. And Marzahl agreed that FHC, against which he originally cross-claimed, could be dismissed from this action with prejudice.

We recognize that our interpretation of the contract which Marzahl had with FHC, and its effect on the parties to this suit, is not the same as the trial court's interpretation. But the construction of an unambiguous contract is a question of law which we review *de novo*. ***Wausau Underwriters Ins. Co. v. Dane County***, 142 Wis.2d 315, 322, 417 N.W.2d 914, 916 (Ct. App. 1987). Marzahl bases his claim on the contract he had with FHC. We have determined that this contract is inapplicable to his dispute with Stelpflug. We might conclude our analysis here, but for Marzahl's assertion that there is no support in the record for the trial court's method of dividing the $19,141.65. We will consider this assertion.

Marzahl argues that because the evidence shows that pigs do not gain weight on a "straight line" basis from birth to market weight, the trial court's analysis is flawed. Marzahl notes that Boyington, who inventoried the pigs on November 20, 1992, considered feed conversion ratios for various groups of pigs during their lives. He asserts that the court should have used the value of the pigs on November 20 and not their weight, to determine his compensation.[5]

Perhaps Marzahl is correct that his contribution to the value of the pigs was more than thirty-seven percent of $19,141.65. But he then asserts that his award should be calculated pursuant to § 9.2 of his agreement with FHC, an agreement we have already determined to be inapplicable to Marzahl's dispute with Stelpflug.

In response to Stelpflug's brief asserting that, in equity, he is entitled to the entire $19,141.65, Marzahl argues that, in equity, he is entitled to the same amount. Essentially, both parties are asserting an unjust enrichment claim. Unjust enrichment is an equitable doctrine which has three elements:

[5] Marzahl also asserts that the trial court's method of dividing the $19,141.65 ignores the fact that some of the 1,383 pigs would die before they could be sold. But he does not show by what amount this factor would increase his award. Consequently, we do not address this issue further.

(1) the plaintiff conferred a benefit upon the defendant; (2) the defendant had an appreciation or knowledge of the benefit; and (3) the defendant accepted or retained the benefit under circumstances making it inequitable for the defendant to retain the benefit without payment of its value. ***Ramsey v. Ellis***, 168 Wis.2d 779, 784-85, 484 N.W.2d 331, 333 (1992).

We review decisions in equity for an erroneous exercise of discretion. ***Consumer's Co-op v. Olsen***, 142 Wis.2d 465, 472, 419 N.W.2d 211, 213 (1988). A discretionary decision must be based upon facts of record and applicable law. ***Hartung v. Hartung***, 102 Wis.2d 58, 66, 306 N.W.2d 16, 20 (1981). It must be the product of a rational mental process by which the facts of record and law relied upon are considered together for the purpose of achieving a reasoned and reasonable determination. ***Id.*** A reviewing court is obliged to uphold a discretionary decision of the trial court if it can conclude *ab initio* that there are facts of record which would support the trial court's decision had discretion been exercised on the basis of those facts. ***Galuska v. Kornwolf***, 142 Wis.2d 733, 737, 419 N.W.2d 307, 309 (Ct. App. 1987), *review granted*, 144 Wis.2d 955, 428 N.W.2d 553 (1988).

Stelpflug does not contend that Marzahl conferred no benefit upon him. It would be difficult to do so. Stelpflug took over an ongoing pig producing operation with 127,654 pounds of pigs. Their value was estimated at $60,530. This head start on finished pigs was a benefit to him. Stelpflug knew of this benefit. He inspected the Guldbek farm pig operation on November 20, 1992. We agree with the trial court's observation that: "Just remember the Court of Appeals—I don't think there are any farmers on the Court of Appeals ...." But we have viewed a videotape of the November 20 inspection of the Guldbek farm. While we may not grasp the significance of everything shown by that videotape, it is readily apparent that Stelpflug was aware that the pigs not owned by FHC would be of some value to him.

The third element of unjust enrichment is also met. Stelpflug accepted the 1,383 pigs from Marzahl under circumstances where it would be inequitable were he not required to reimburse Marzahl for the work he had done to raise the pigs from birth to the various weights noted by Boyington. The only question remaining is how much money should Marzahl receive.

The benefit Stelpflug received is Marzahl's labor. Marzahl does not assert that he should be paid for a set number of hours at a set hourly rate. He bases his claim on a contract provision which we have found inapplicable. Evidence of the value of his labor would be difficult to use because each farmer claims the entire $19,141.65. The trial court could not know what effort and hours of labor went into each farmer's part of the pig raising operation. Because an unjust enrichment claim looks at value of labor or goods contributed, Boyington's estimates of the rate gain of the pigs at various times in their lives would not have much to do with the value of Marzahl's services. We recognize that efficiency is a factor in getting pigs to market more quickly and that this factor has some value. But we are not persuaded that this factor contributes much to a determination of the fair price of Marzahl's labor. Marzahl will be paid a fair part of $19,141.65, and that may be more or less than the total value of Marzahl and Stelpflug's services.

We are left with the same problem that the trial court faced. Boyington's figures as to the value of the Guldbek pigs is based upon finding a buyer for pigs of a size that are not commonly sold. Using the assumed value of the pigs on November 20, 1992, if a buyer could be found for them, and comparing that value with the value of the pigs when marketed does not reflect the value of Marzahl's labor any more than using their weight to do the same thing. We do not know whether the talent, time and effort to bring groups of pigs from birth to twenty or eighty pounds is worth more or less than the talent, time and effort to raise pigs from fifty or 100 pounds to 250 pounds. Whether we look at this case *de novo* or for erroneous exercise of discretion, the result is the same. We can see no more accurate way to determine the equitable division of the $19,141.65 than the way used by the trial court.

STELPFLUG'S CROSS-APPEAL

We have already dealt with most of the issues raised by Stelpflug in his cross-appeal. He asserts that the trial court erred by awarding any portion of the $19,141.65 to Marzahl because Marzahl breached his lease with Guldbek and his contract with FHC. We agree that Marzahl did not vacate the Guldbek farm at the end of his lease term and had to be evicted. We have explained why Marzahl did not breach his contract with FHC. But we fail to see why these factors have much to do with an unjust enrichment suit between Marzahl and Stelpflug. The trial court did not erroneously exercise its discretion by giving a portion of the $19,141.65 to Marzahl.

Accordingly, we modify the judgment to take into account the mathematical errors. Of the $19,141.65 which FHC paid to the trial court, Marzahl is entitled to thirty-seven percent, or $7,082.41, and Stelpflug is entitled to sixty-three percent, or $12,059.24. The judgment of the trial court is modified, and as modified, affirmed.

By the Court.—Judgment modified and, as modified, affirmed.

Not recommended for publication in the official reports.